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AUTHOR Schimmel, David
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ABSTRACT

To assist public school administrators in identifying constitutionally permissible religious observances of national religious holidays, this paper analyzes a federal appellate court case, Florey v. Sioux Falls School District, in which it was found that public schools would not violate the First Amendment by observing religious holidays if the holidays have a secular basis, if the observances are presented in a prudent and objective manner, and if their primary purpose and effect is to promote secular educational goals such as advancing student knowledge about our religious heritage and diversity. The paper cautions that such observances must relate only to the secular aspects of holidays, and must contain no element of religious or theological content, in order to be constitutionally permissible. (JEH)

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A Legal Memorandum

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NASSP

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

RELIGIOUS HOLIDAY OBSERVANCES IN PUBLIC SCHOOLS:

When Are They Constitutional?

How should we handle religious holidays in the public schools? Two approaches are familiar but problematic.

Some schools prohibit all religious holiday observances to avoid violating the First Amendment. They might have a winter or spring assembly but no Christmas or Easter programs. This approach ensures a clear separation of church and state. However, most school people feel that such a complete separation is not practical or appropriate. And it is probably not required by the Constitution.

Other school districts have no written policy. They allow each school or teacher to decide how to handle religious holidays. This poses the danger of inconsistent, insensitive, controversial, and unconstitutional programs. Few educational problems are more emotionally charged and potentially divisive than trying to satisfy parental objections to Christmas assemblies in mid-December.

Guidelines Are Needed

While some educators are satisfied with these approaches, most want written guidelines that allow schools to observe national religious holidays, guidelines that can help them distinguish between an unconstitutional religious observance and a permissible educational activity. Until last year, judges provided little guidance on this difficult legal issue.[1]

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[1] The U.S. Court of Appeals for the District of Columbia did decide a case on the related issue of whether a religious display could be erected on public property as part of the seasonal celebration. The display at issue was a Nativity scene erected on the Ellipse as part of a "Christmas Pageant of Peace" cosponsored by the U.S. Department of the Interior and other organizations. Although the display was not constructed or maintained by the government, an estimated $72,000 of public funds was expended on planning and building the display. Nevertheless, the court found it did not violate the First Amendment prohibition against establishment of religion. *Allen v. Morton*, 495 F. 2d 65 (1973).

This Legal Memorandum was written by David Schimmel, attorney and professor of education at the University of Massachusetts at Amherst.

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Then in the 1980 case of Florey v. Sioux Falls School District, a federal appeals court confronted the school problem directly.[2] The following discussion not only examines the decision in this controversial case, but also suggests alternative guidelines that school people can use to avoid similar conflicts.

The Florey Case

The Sioux Falls controversy developed in 1977, when two kindergarten classes rehearsed, memorized, and then performed for parents a Christmas assembly replete with religious content. Part of the assembly consisted of The Beginner's Christmas Quiz that included exchanges between the teacher and class such as the following:

> Teacher: Where had they [the angels] made a bed
> For Christ, the blessed Savior's head?
>
> Class: In a manger in a cattle stall.
>
> Teacher: What is the day we celebrate
> As birthday of this One so great?
>
> Class: Christmas.

As a result of complaints about this and other Christmas assemblies, the Sioux Falls School Board developed a policy and rules concerning the observance of religious holidays. The policy acknowledged that schools should not promote religion but should encourage an appreciation and tolerance of diverse religious beliefs and increase student knowledge of the role of religion in the development of civilization. No one objected to this policy.

However, there were strong objections to several of the rules which provided:

(1) that schools may observe holidays "which have a religious and a secular basis;"

(2) that "music, art, literature, and drama having religious themes are permitted as part of the curriculum" if presented in a "prudent and objective" manner; and

(3) that the use of religious symbols as teaching aids is permitted provided they are displayed as "an example of the cultural and religious heritage of the holiday and are temporary."

Roger Florey and several other parents claimed that the rules which allowed religious songs (such as "Joy to the World, The Lord Is Come" and "Silent Night, Holy Night") and symbols (such as the cross and the Nativity scene) were unconstitutional, and they asked a federal court to prohibit their implementation. The lawsuit caused intense public controversy in Sioux Falls for almost two years.

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[2] *Florey v. Sioux Falls School District 49-5*, 464 F. Supp. 911 (D.S.D. 1979); 619 F. 2d (8th Cir. 1980), Cert. Den. 101 Sup. Ct. 409 (1980).

According to the trial court, most of those who opposed the plaintiffs argued that "the public schools should be allowed to promote the Christian religion." In rejecting this popular perspective, Judge Bogue referred to the persecution of Christians by the Romans and wrote that under our Constitution the "numerical superiority of Christians should never be the basis for advancing the Christian religion" in our schools. Nevertheless, for other reasons he upheld the Sioux Falls rules, and the plaintiffs appealed to the federal circuit court.

A Three-Part Test

To determine whether the Sioux Falls rules were constitutional, the appeals court used the three-part test developed by the U.S. Supreme Court in a number of earlier cases. First, the rules must have a secular purpose. Second, their "primary effect must be one that neither advances nor inhibits religion." Third, the rules must not foster "an excessive entanglement with religion."

Purpose. The appeals court noted that the Sioux Falls rules limit holiday observances to those that have "both a religious and a secular basis," thus prohibiting holidays that are solely religious. Since religious themes must be presented in an objective manner and religious symbols can only be used as temporary teaching aids, two of the three appellate judges concluded that the motivation behind the rules "was simply to ensure that no religious exercise" was part of official school activities.

On behalf of the majority, Judge Gerald Heaney explained that the purpose of the Sioux Falls rules was quite different from the unconstitutional intent in the school prayer and Bible reading cases. Instead of requiring "undeniably religious" activities such as prayer and Bible reading, the Sioux Falls rules are simply "an attempt to delineate the scope of permissible activity...not to mandate a program of religious inculcation."

Effect. Judge Heaney noted that "the First Amendment does not forbid all mention of religion in public schools," only the advancement or inhibition of religion. Hence, the study of religion is not prohibited "when presented objectively." The court viewed the term "study" to include assemblies and performances as well as classroom instruction. Thus the majority felt that if students could properly study religious music and drama, they could also perform it.

To determine whether religion was advanced by the Sioux Falls rules, Judge Heaney considered whether they furthered a "secular program of education." According to the judge, the rules allow the presentation of materials that "although religious in origin take on independent meaning." He observed that much of the art, literature, and music associated with holidays such as Christmas has acquired a significance that is no longer strictly religious but has "become integrated into our national culture and heritage." Since permitted programs must deal with the secular or cultural basis of the holidays and must be presented in a "prudent and objective" manner, Judge Heaney concluded that the advancement of a "secular program of education" and not of religion "is the primary effect of the rules."

The court used the 1977 kindergarten Christmas program to illustrate the difference between an activity that primarily advances religion and programs permitted by the new rules. The quiz, wrote Judge Heaney, was a "predominantly

religious activity which exceeded constitutional bounds" and "would be prohibited by the new rules." The judge, however, did not explain precisely why reciting the quiz was clearly prohibited but singing "Away in the Manger" or "O Come,All Ye Faithful" was not.

Entanglement. Finally, the court held that the rules "do not unconstitutionally entangle the Sioux Falls school district in religion." Most "entanglement"cases deal with government aid to religious schools, not with activities in public schools. In this case, rather than entangling the schools with religion, "the rules provide the means to ensure that the district steers clear of religious exercises.

The Dissenting Opinion

In a long and thoughtful dissenting opinion, Judge Theodore McMillian also used the three-part test but arrived at a different conclusion. Judge McMillian agreed that the Sioux Falls policy promoting "knowledge of society's cultural and religious heritage" was an appropriate goal. But he noted that the U.S. Supreme Court has prohibited "the use of religious means to achieve secular ends where nonreligious means will suffice." Surely, he wrote, schools can advance student knowledge of religious diversity "as effectively by nonreligious means," for example, "through the study of comparative religions."

Judge McMillian argued that religious holidays such as Christmas have "no inherent secular basis." Although Christmas has acquired commercial importance, it celebrates an event of ultimate significance to Christians, "the birth of Christ." To the extent that schools justify the observance of Christmas to promote religious tolerance and peace on earth, these objectives could be accomplished by observing a neutral holiday such as U.N. Day. Such substitutes would be unsatisfactory, observed the judge, "only to the extent that the present activities do in fact serve religious goals."

The dissent noted that when a school openly promotes one religion's holidays through Christmas programs, the benefits to that religion and the disadvantages suffered by others are obvious. "Persons who do not share those holidays are relegated to the status of outsiders by their own government; persons who do observe those holidays can take pleasure in seeing...their belief given official sanction." Judge McMillian concluded that whatever their purpose, the traditional Christmas programs have a primary effect of promoting religion and are thus unconstitutional.

Implications of the Case

Although the dissenting opinion raises important questions for educators to consider, the majority upheld the Sioux Falls rules; and Judge Heaney's opinion stands as a major decision on holiday observances.

In summary, the opinion indicates that public schools would not violate the First Amendment by observing religious holidays if:

(1) the holidays have a "secular basis;"

(2) they are presented in a "prudent and objective" manner; and

(3) their primary purpose and effect is to promote secular educational goals such as advancing student knowledge about our religious heritage and diversity.

In addition, it is not unconstitutional to sing or play religious music or read from religious literature if presented objectively as part of the educational curriculum for holiday programs. Similarly, religious symbols may be displayed temporarily as examples of the cultural and religious heritage on the holiday.

On the other hand, if a Christmas program violates the First Amendment, it will not become constitutional by making attendance or participation voluntary. Nor will it become constitutional by adding a Jewish or Moslem song, symbol, or ceremony.

Cautions To Be Noted

While Florey held that the Sioux Falls rules did not violate the First Amendment under prevailing constitutional principles, the application of these principles is far from precise. As the trial judge noted, Florey is a case "of first impression and one which presents an extremely close question of law." And the dissenting opinion illustrates how judges and lawyers can differ on the application of constitutional law to specific controversies.

One court might find that the primary purpose or effect of singing theologically-based carols at Christmas is religious; another might rule that the activity is primarily secular. Since lawyers and judges differ on such "close questions of law," it is especially difficult for the average teacher or principal to clearly distinguish between permissible holiday observances and unconstitutional ones.

Alternative Guidelines

The complexity of the Florey decision suggests the need for an alternative approach to assist school people in deciding what holiday programs to allow or prohibit. Such an approach was developed several years ago in a comprehensive law journal article. In addition to being constitutionally sound, the proposed approach is less ambiguous and easier to apply than the Supreme Court's three-part test. It can be summarized briefly in the following guidelines:

> The content of religious-holiday programs must relate only to the secular aspect of the holiday. Cultural or secular songs and symbols of the holiday may be used. However, no element of religious or theological content may be included. Thus religious symbols, hymns, carols, prayers and readings are not allowed.[3]

To illustrate the application of these guidelines to Christmas, symbols such as Santa Claus, the Christmas tree, reindeer, sleigh bells, or Frosty the Snowman could be used. But religious symbols such as the cross

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[3] These guidelines were adapted from a more detailed proposal in Religious-Holiday Observances in the Public Schools, 48 N.Y.U. Law Review 1116 (1973).

or the Nativity scene could not. Similarly songs such as "Deck the Halls," "White Christmas," and "Jingle Bells" could be sung. In contrast, religious hymns or carols such as "Hark! The Herald Angels Sing," "O Holy Night," and "O Come, All Ye Faithful" would not be permitted.

These guidelines are relatively clear and only require school officials to distinguish the cultural and secular aspects of a holiday program from the religious and theological. Unlike the Supreme Court's test, these guidelines obviate the need to examine ambiguous and subjective matters such as the intent or purpose of a holiday observance, to weigh the primary effect of the program, or to consider whether it might cause schools to become entangled with religion. Although the guidelines eliminate much traditional material, they still permit a rich and varied Christmas program.

In communities that wish to increase student knowledge of religion, schools could consider offering objective, well-balanced courses that teach about religion.[4] This might ease the pressure on school boards to include religious material in holiday observances. And guidelines which restrict the use of religious music, symbols, and prayers as part of holiday observances would not apply to educational courses about comparative religion or western music.

Conclusion

For public schools that want a policy on religious holiday programs that goes beyond complete prohibition or laissez-faire, two approaches have been examined. One is illustrated by the policy and rules developed in Sioux Falls, South Dakota. This allows holiday observances to include religious songs, symbols, and literature if their purpose and effect is secular and they are presented objectively as part of the educational curriculum. Before Florey, many lawyers considered such an approach to be constitutionally doubtful. Now there is some legal precedent and policy guidelines for districts that choose this alternative.

A second approach to religious holiday observances is less complex and ambiguous. It simply allows school programs to include secular or cultural aspects of the holiday but does not permit content that is religious or theological. Although this may not be as popular in some districts as the Sioux Falls approach, it is easier to understand and implement from a constitutional, administrative, and educational perspective. The full texts of both policy alternatives are available for your school to consider.[5] Whatever approach you adopt, don't wait until December to clarify and communicate it to your parents, teachers, and other staff.

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[4] For more information on such programs, contact the National Council on Religion and Public Education, 1300 Oread, Lawrence, Kans. 66045; World Religions Curriculum Development Center, 6425 W. 33 St., Minneapolis; Minn. 55426, or Public Educational Religion Studies Center, Wright State University, Dayton, Ohio 45431.

[5] See preceding footnotes. The appendix of the trial court and appellate opinions includes the Sioux Falls Policy and Rules, and the N.Y.U. Law Review Note includes specific Guidelines for Public Schools and detailed explanations. For a broader perspective on this issue, see Patricia Lines, Religious and Moral Values in Public Schools: A Constitutional Analysis (Education Commission of the States, Denver, Colo. 1981).

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